In the Supreme Court of the United States

October Term, 1952.

No. ~~301.~~ 6

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD and CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND WAREHOUSEMEN, LOCAL UNION NO. 41, A. F. L., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

CLIF. LANGSDALE
JOHN J. MANNING,
928 Scarritt Building,
Kansas City, Missouri,
Attorneys for Respondent.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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Opinions Below.

The opinion of the Court of Appeals (R. 90-95) is reported at 196 F. (2d) 1. The findings of fact, conclusions of law, and order of the petitioner (R. 13-30) are reported at 94 N. L. R. B. 1494.

Jurisdiction.

The judgment of the court below was entered on April 29, 1952 (R. 95). The Board's petition for rehearing was denied on June 2, 1952 (R. 99). The petition for a writ of certiorari, filed on August 28, 1952, was granted on October 20, 1952 (R. 101). The jurisdiction of this Court was invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

Questions Presented.

The N. L. R. B. had found that the employer in this case, by reducing an employee's seniority for being delinquent in the payment of his Union dues, discriminated against such an employee in violation of Section (8) (a) (3) of the Act "for, in so doing an employer would be strengthening the position of such Union."

The Court of Appeals found that "the evidence here abundantly supports the finding of the Board that the respondent caused or attempted to cause the employer to discriminate against Boston in regard to 'tenure * * * or condition of employment.' This was a violation of Section (8) (b) (2) of the Act. This question confronting us, therefore, is whether there is substantial evidence to support the finding that such discrimination would or did encourage or discourage membership in any labor organization in violation of Section (8) (a) (3) of the Act. Discrimination alone is not sufficient," and that "having considered the record as a whole, we can find no substantial evidence to support the conclusion that the discrimination in regard to the tenure or condition of employment of Boston did or would encourage or discourage membership in any labor organization." That "the testimony of Boston, however, shows clearly that this Act neither encouraged nor

discouraged his adhesion to membership in the respondent Union. The question then is, did the act of the Union encourage or discourage other employees who might learn what had been done? Unless the statute may be interpreted to apply to such other employees there is no evidence, substantial or otherwise, to sustain the order of the Board. If, on the other hand, it must be so construed, then the order is supported only by "suspicion" and speculation. There is no evidence in the record, either substantial or in the nature of scintilla to support it." The question presented is: whether, absent a scintilla of evidence to that effect, there is inherent an *assumed*[1] encouragement or discouragement of membership in a labor organization within the meaning of Section (8) (a) (3) of the Act from a finding of discrimination against an employee arising out of the application of a by-law of a labor organization of which he is a member. More simply stated, was the Court of Appeals correct in holding that the Board had the burden of producing substantial evidence of the fact that "the act of the Union encourage(d) or discourage(d) other employees who *might* learn what had been done."

Statute Involved.

The pertinent provisions of the Labor Relations Act, as amended (61 Stat. 136 and 65 Stat. 601, 29 U. S. C. Supp. V, 141, et seq.), are as follows:

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also

[1]Throughout this brief emphasis is supplied unless otherwise indicated.

have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(b) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues

and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * * *"

STATEMENT.

Upon the basis of a charge filed by Frank Boston (R. 2-3), employee of the Byers Transportation Company, a complaint was issued alleging that, in violation of Section 8 (b) (a) and (1) (A) of the Act, the respondent Union had caused the Company to discriminate against Boston by reducing his seniority standing because of Boston's delinquency in paying his dues to the Union (R. 4-6). The findings of fact pertinent to this complaint, which are undisputed, may be summarized as follows:

I.

Facts of the Case.

About eight years ago, after being duly acted upon at three regular meetings, Section 45[2] of respondent Union's by-laws was passed by a majority vote of the members (R. 58, 71, 72 and 74). Frank Boston, a member of that Union since 1936, opposed passage of that amendment to the by-laws (R. 71).

In 1946 Boston became a truck driver for Byers Transportation Company, a common carrier in motor transportation (R. 54). That employer and the respondent were parties to a collective bargaining agreement known as the "Central States Area Agreement" (R. 37).[3] Insofar as employees represented by respondent were concerned that agreement did not contain a Union security clause. Article V of that agreement contained a provision that seniority

[2]Section 45. Any member, under contract, one month in arrears for dues shall forfeit all seniority rights.
(a) Clarification of the above paragraph: On the second day of the second month a member becomes in arrears with his dues (R. 65).

[3]This agreement has been executed with employers by more than 300 Locals of the parent Union in 12 different states (R. 75).

should prevail and provided that "any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement" (R. 41). After Section 45 was added to respondent's by-laws, representatives of the employers and the Unions, who were parties to the Central States Area Agreement, discussed that section in connection with Article V of that agreement and agreed that instances "when members become in arrears in their dues and Section 45 of the by-laws has set up" would be "included in the phrase 'any controversy' mentioned in Section 1 of Article V" of the agreement (R. 50, 74-77). Boston did not pay his June, 1950, dues until July 5, 1950. On that date he was No. 18[4] at the top of the seniority list (R. 56). By automotic application of Sec. 45 of the by-laws his standing was reduced to No. 54 at the bottom of the list.

After filing a charge of unfair labor practice upon which the complaint of petitioner was later issued, Boston asked to be permitted to withdraw such charge. That request was denied (R. 58). He testified that he had agreed and wanted to be bound by the constitution and by-laws of respondent, had no intention of refraining from any of his Union activities or refraining from any of the benefits of liabilities that attend membership in respondent, that his purpose in filing the charge was to try to get rid of Section 45 and that subsequent to such filing he decided that he was not proceeding correctly, and that he "should go through the Union itself to get this rule taken off the books," and "prevail on the rest of the members, or a majority of them at least, to vote the rule out of existence." (R. 72.)

[4]Boston unquestionably enjoyed this high seniority standing because of the fact that there had been many other instances where drivers had been reduced in seniority standing due to the application of Section 45 (R. 50-51).

II.

The Board's Conclusions and Order.

The Board, member Murdock dissenting, found that the Union had violated Section 8 (b) (2) of the Act by causing a reduction in Boston's seniority because of his delinquency in the payment of his dues (R. 14-15, 25-27). The Board held that, "absent a valid contractual union security provision, Boston had the absolute protected right under the Act to determine how he would handle his union affairs without risking any impairment of his employment rights and that the Union had no right at any time whether Boston was a member or not a member to make his employment status to any degree conditional upon the payment of dues * * *" (R. 14). The Board observed that the discrimination against Boston had the "effect of enforcing rules prescribed by the Union, thereby strengthening the Union in its control over its members and its dealings with their employers and was thus calculated to encourage all members to retain their membership and good standing either through fear of the consequences of losing membership or seniority privileges or through hope of advantage in staying in" (R. 27). The Board also held that, in violation of Section 8 (b) (1) (A) of the Act, the Union's reduction of Boston's seniority restrained and coerced him in the exercise of his right to refrain from assisting a labor organization (R. 26, 15).

The Board entered an order requiring the Union to cease and desist from the unfair labor practices found and from related conduct; to notify Boston and the Company that the Union withdraws its request for the reduction of Boston's seniority and that it requests the Company to offer to restore Boston to his former status; to make Boston whole for any losses of pay resulting from the discrimination; and to post appropriate notices of compliance (R. 16-17).

III.

The Court's Decision.

The Board's petition to enforce its order was denied by the court below (R. 31-33, 90-95). The court agreed that the Union had "caused or attempted to cause the employer to discriminate against Boston," but, holding that "discrimination alone is not sufficient," it stated that the question was whether "there is substantial evidence to support the finding that such discrimination would or did 'encourage or discourage membership in any labor organization' * * *" (R. 93-94). Noting that Boston was a member of the Union from the inception of his employment with the Company and is still a member (R. 94), the court below concluded that the reduction in his seniority "neither encouraged nor discouraged his adhesion to membership" in the Union (R. 95). The court states further that, assuming the effect on other employees of the discrimination against Boston was relevant, there was no evidence to support a conclusion that the membership of other employees in the Union was affected (R. 95). The court concluded that the Union had not violated Section 8 (b) (2) of the Act; it did not advert to the Board's companion holding that the Union's conduct violated Section 8 (b) (1) (A) of the Act.

Summary of Argument.

A labor organization is not an entity separate and apart from its collective members. The Union in applying its by-laws did not intend to, nor did such action, encourage membership within the meaning of Section 8 (a) (3) of the Act. There was no discrimination within the meaning of the Act, by the simple application of a Union by-law to a member, where the same by-law was uniformly applied to all other members of the Union.

The Labor-Management Relations Act of 1947, as amended, imposed upon the court below a finding that a question of fact was supported by substantial evidence on the record considered as a whole, and in this case that court was unable to find any evidence in the record which supported two relevant facts, one, that respondent Union's action in applying its by-law had as its purpose encouragement of membership in that Union, and two, that other employees were encouraged or discouraged in such membership by reason of the Union's action.

ARGUMENT.

A. Respondent as a labor organization is not an entity apart from its collective membership.

Throughout the Board's decision and the briefs on behalf of the Board there appears a mistaken concept of a labor organization as an entity apart from its members. Respondent is an unincorporated association of employees, and as such acts only through the will of a majority of its members. The definition of "Union"[5] is "that which is united, or made one; something formed by a combination or coalition of parts or members, a confederation; a consolidated body; a league; as, the United States of America are often called 'the Union'." The actions of respondent in the application of Section 45 of its by-laws are merely compliance with the expressed will of a majority of the members.

Section 45 had been in effect for eight years (R. 74) and was passed after being "taken up in three of the meetings of the Union (by) * * * a majority of those who were present" (R. 71). It has been applied without discrimination as between members of that Union and "there have been many instances * * * when members have become in arrears in their dues and Section 45 of the by-laws has set up" (R. 75). Stated another way, Boston was treated in exactly the same manner as all other members were treated and the action in his case, as in all others, resulted from the will of the majority of the members as expressed in their Union by-laws. This is not a case of Union officers or agents attempting to restrain or coerce members, nor it is an instance of the type of abuse which Congress sought to remedy by including Section 8 (b) in the N. L. R. A.

[5]Webster's New International Dictionary, Second Edition.

In any discussion of this case it must be borne in mind that the Board itself has acknowledged that this by-law is not *per se* illegal.[6]

The absence of a valid Union security agreement in this case seemingly has caused the Board to mistakenly treat the Union as something entirely apart from its members and to ascribe to that separate entity a desire and intention to punish individual members who fail to maintain their dues payments in the prescribed time. This assumed intention is then followed by a further assumption, that is, that the purpose of such punishment was to encourage membership in the Union.

The illogic of such reasoning was very ably pointed out by member Murdock in his dissent (R. 18).[7]

Respondent has consistently contended before the Board and the court below that the existence of Section 45 of the by-laws would tend to discourage membership rather than encourage it. However, such discouragement is not banned by Section 8 (a) (3). As stated by Mr. Murdock "Boston was entirely free to withdraw from membership in the Union without suffering any detriment in his employment. He chose, however, to remain in the Union, subject to the Union's rules" (R. 20). (*Respondent urges*

[6]Firestone Tire & Rubber Company, 93 N. L. R. B. No. 161. There the contract between the Company and the Union contained a valid Union security clause and the Board held that since the Union could have effected the employee's discharge it did not discriminate against him by doing less, namely, effecting a reduced seniority standing.

[7]"In what respect was Boston or any other employee of the employer restrained, coerced or discriminated against? The theory of the majority perforce must be that the employer's action to execute the Union's by-law constitutes discrimination violative of Section 8 (a) (3) was calculated to 'encourage' membership in and adherence to the rules of the Union. Common sense, however, tells us that the employer's action did not encourage membership in the Union. As there is no Union-security clause compelling membership in the Union, it would be quite apparent to Boston that if he resigned from the Union he could suffer no detriment in his employment, but on the contrary, would be better off because he would no longer be subject to the Union's by-laws and subject to reduction in seniority if he fell behind in his dues payments." (Dissent of member Abe Murdock.)

this Court, as it did the court below, to study this entire dissent, as it embodies all of the contentions of respondent and succinctly states the position of the respondent on the question of whether or not reduction of the employee's seniority encouraged membership in the Union in violation of Section 8 (a) (3), and whether such actions restrained or coerced Boston in violation of Section 8 (b) (1) (A).)

The rules referred to were the rules which Boston, as a member of a group, had, by remaining a member, agreed to be bound after a majority of his fellow members had decided that such rules were to be the "law" for their group. Boston's position as No. 18 on the seniority list unquestionably had resulted from previous application, in intervening years, of Section 45, since his employer testified that in his "own company there have been many other instances where people have been, men have been reduced in seniority standing as the result of their failure to pay dues" (R. 50).

B. A finding of violation of Section 8 (a) (3) of the Act requires a finding of purpose or intention to "encourage" or "discourage" membership in a labor organization.

Neither the employer, Byers Transportation Company, nor the respondent had as a purpose or intention in the application of Section 45 of the by-laws the encouragement or discouragement of membership in respondent within the proscription of Section 8 (a) (3). Such encouragement or discouragement does not logically or impliedly flow from the parties' actions. Congress did not intend the phrase "encourage or discourage membership in any labor organization" found in Section 8 (2) (3) to encompass a factual situation such as this. Clearly, the existence of the respondent's by-law and the employer's

assistance in enforcing it would *tend to restrain* applications for membership in respondent and incite withdrawals from membership by members who were fearful of losing seniority standing. Certainly it cannot be argued that such was the type of "discouragement" that Congress had reference to in drafting Section 8 (a) (3).

This discouragement of membership arises from the fact that the by-law of respondent applies only to members of that labor organization. Therefore, employees who are not members are not affected by the by-law although covered by the seniority clause in the collective bargaining agreement. The record discloses that there is no valid union shop agreement in existence and there is nothing in the record to indicate that respondent and the employer illegally conducted an unlawful union shop arrangement. Therefore, it not being incumbent upon an employee to become a member, it logically follows that it would be to his benefit to refrain from membership and thus avoid the possibility of reduction in seniority by application of the by-law. Thus Section 45 of respondent's by-laws does not "encourage" membership. If anything, it should tend to discourage such membership when it is obvious that such membership carries with it a rather drastic penalty for failure to keep current in dues payments.

The fact that Boston remained a member after the by-laws was put into effect several years ago has no particular evidentiary value here since, so far as this record indicates, he may have had many reasons for valuing his membership in respondent and remained a member in spite of, and not because of, Section 45 of the by-laws.

A finding that respondent violated Section 8 (b) (2) must be preceded by a finding that the employer's actions were violative of Section 8 (a) (3). Assuming for the

purpose of argument, that the record of this case contains sufficient evidence of respondent having caused the employer to treat Boston's seniority as reduced because of the application of Section 45 of respondent's by-laws, respondent contends that this reduction would not result in an unfair labor practice within the meaning of the National Labor Relations Act, as amended, because it was not motivated by a desire to encourage or discourage Boston's union membership or nonmembership but rather on a nondiscriminatory by-law of respondent and the nondiscriminatory application of that by-law under the collective bargaining agreement. This is not discrimination within the meaning of the Act. The term "discrimination" as used in Section 8 (a) (3) and in the law of labor relations "refers to inequality of treatment based upon the desire of employers to discourage free employee organization for collective bargaining purposes."

Under Section 8 (a) (3) employers may not discriminate in regard to hire or tenure of employment or any term or condition of employment if such action is motivated by a desire to encourage or discourage membership in a labor organization. Employers are not prohibited, however, from any discrimination if they are not motivated by a desire to inhibit free organization. In order to hold that violation of that section has occurred, a preponderance of the evidence must establish that the discrimination was motivated by anti-union or pro-union considerations. Failing in this burden of proof, the Board may not hold that a violation of Section 8 (a) (3) has occurred. The employer is free to discourage or otherwise discipline his employees for a good cause, a bad cause or no cause at all, so long as he is not primarily motivated by anti-union considerations and so long as encouragement or discouragement of union membership or activity

will not be a direct and foreseeable consequence of the employer's conduct. This Court, in upholding the constitutionality of Section 8 (a) (3), stated:[1]

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for the interference with the right of discharge when that right is exercised for other reasons, than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts." *NLRB* v. *Laughlin Steel Corp., supra.*

and that:

> "We think that the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. * * * To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining." *NLRB* v. *Fansteel M. Corp., supra.*

It is important to remember that whatever rights Boston had, insofar as seniority was concerned, arose out of the contract between his employer and his bargaining agent, the Union. Seniority rights of employees, whether or not they are Union members, are entirely created and limited by agreements which are binding upon them. Such agreements do not create permanent rights and may be *modified* by the parties in the *general interest* of all Union mem-

[1] *NLRB* v. *Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615; *Associated Press* v. *NLRB*, 301 U. S. 103, 57 S. Ct. 650; *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S Ct. 490.

bers. *Elder* v. *New York Central Railway Co.*, 152 F. 2d 361. Seniority is not an inherent, natural, or constitutional right and does not arise from mere employment independently of contract, but exists by virtue of a contract between an employer and a union, inuring through the latter to the benefit of its members or other employees covered by the agreement. *Wooldridge* v. *Denver & Rio Grande Western R. R. Co.* (Colo. Sup. Ct., 1948), 21 LRRM 2612. *Edelstein* v. *Duluth, Missabe and Iron Range Railway Co.* (Minn. Sup. Ct., 1948), 21 LRRM 2533.

There was abundant, clear, unequivocal and unrefuted testimony to the effect that the parties negotiated Section 1 of Article V of the Central States Area Agreement (R. 41), having discussed Section 45 of the by-laws of respondent and intended, when they negotiated the phrase "any controversy over the seniority standing of any employee," to include instances where employees are reduced in seniority standing because of Section 45 of the by-laws (R. A. 11, 27-31). That the parties understand and that it has been their custom and practice to interpret Section 1 of Article V of their contract to construe the phrase "any controversy over the seniority standing of any employee," as that phrase is used in such Section 1, as including instances where employees are reduced in seniority standing because of the operation of Section 45 of Respondent's by-laws, is also abundantly clear (R. A. 9, 11, 12, 14, 16, 27-31).

In *Doyle et al.* v. *Division No. 1127 of Amalgamated Association of Street Electric Railway & Motor Coach Employees of America et al.*, 76 F. Supp. 655, Aff., 168 F. 2d 876, it was held that a bus company met its statutory obligation by establishing the seniority of re-employed veterans as of the date they were approved as intercity extra-board operators of busses by predecessor

company, if they were so approved, and as of a specified date, if they were not so approved, in accordance with valid collective bargaining contracts. The court refused to disturb decisions of Union tribunals which settled disputes over seniority rights. In passing upon the decisions of such Union tribunals, the court said:

> "The seniority rights of the nonveteran plaintiffs are in accordance with decisions of the officers and tribunals of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, of which union all plaintiffs are members. Said decisions were rendered to settle the dispute over seniority rights existing within Division 1216 and after the merger of said Division in Division 1127, between the members of the former Division 1216 and Division 1127. The plaintiffs had a full and fair hearing before the tribunals of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America. The decisions by said tribunals were *in accordance with the constitution* of that organization; they were neither in excess of their jurisdiction, nor fraudulent, in bad faith, nor in contravention of any public policy or of the law of the land. As a matter of law, they will not be disturbed by this court."

With regard to the absence of bad faith or fraud of Boston's rights and in view of the general application of the by-laws to all members, see *Elder* v. *New York Central Railway, supra.*

The law is well settled that where, as here, seniority rights arise solely from a collective bargaining agreement the bargaining agent, where it acts for the benefit of all and not in bad faith or fraudulently, can change seniority provisions even though such change may adversely affect some of the employees covered by such agreement. In *Hartley* v. *Brotherhood of Railway and Steamship Clerks,*

283 Mich. 201, 2 LRRM 872, plaintiff, a married woman, had a number of years of seniority which she had acquired through a contract between the railroad company and the defendant union. She lost her job and, of course, her seniority rights because of an agreement of the union that married female employees be dismissed. There the railroad company informed the officers of the union that protests against the company's retention of married women in its employ were becoming so acute as to result in a serious impairment of personnel relations. Union meetings were held and a majority vote of those in attendance favored modifying the agreement to permit the discharge of married women irrespective of seniority. In passing upon plaintiff's claim that the union had breached contractual rights existing between the union and the married women, the court said:

> "The purposes of the Brotherhood (union), as stated in the preamble to the constitution, are to promote unity of action and the general welfare of the members thereof. Those purposes are accomplished by the instrument of collective bargaining with the employer as to conditions of employment, etc.
>
> "But by becoming a member of the Brotherhood, no contractual rights arose out of the constitution, statutes and protective laws which guaranteed plaintiff that no action would be taken or agreement made for the benefit of the Brotherhood *as a whole* if such action would operate to the detriment of plaintiff *as an individual.*
>
> "The seniority rights acquired by her did not arise by virtue of her contract of employment with the employer, but existed by reason of the agreement of 1921 between the Railway and the Brotherhood. *Ryan* v. *New York Cent. R. Co.,* 267 Mich. 202. This agreement was executed for the benefit of *all* the members of the Brotherhood and not for the *individual* benefit of plaintiff.

> "When, by reason of changed economic circumstances, it became apparent that the earlier agreement should be modified in *the general interest of all members* of the Brotherhood it was within the power of the latter to do so, notwithstanding the result thereof to plaintiff. The Brotherhood had the power by agreement with the Railway to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify *or destroy* these rights in the interest of all the members.
>
> "A different situation might be presented had the agreement of 1932 been accomplished as a result of bad faith, arbitrary action, or fraud directed at plaintiff on the part of those responsible for its execution. No claim or showing of such a nature is made in this case."

The Supreme Court of Missouri in the case of *Williams* v *A. T. & S. F. Railway Co.*, 204 S. W. 2d 693, held that one employed by a railroad as a fireman acquired a seniority right by virtue of the collective bargaining agreement between the railroad and its firemen and in doing so accepted all the conditions attached thereto, including the methods prescribed for settling disputes. The court cited in support of that finding a decision of this Court in *Elgin J. & E. R. Co.* v *Burley*, 327 U. S. 661, 66 S. Ct. 721. In the latter case, this Court in passing upon the question as to whether the collective bargaining agent had authority to finally settle an aggrieved individual employee's claim said:

> "The question whether the collective agent has authority, in two pertinent respects, does not turn on technical agency rules such as apply in the simple, individualistic situation where P deals with T through A about the sale of Blackacre. We are dealing here with problems in a specialized field, with a long

> background of custom and practice in the railroad world."

and that:

> "Furthermore, so far as union members are concerned, and they are the only persons involved as respondents in this cause, it is altogether possible for the union to secure authority in these respects within well-established rules relating to unincorporated organizations and their relations with their members, by appropriate provisions in their *by-laws,* constitution or other governing regulations, as well as by usage or custom."

In the case now before this Court the respondent first secured from its members the authority to bargain regarding a reduction in their seniority. After obtaining this authority, according to the evidence in this case, the respondent by contract with the employer obtained the right to determine all questions of seniority standing; including the right to reduce the seniority standing only of its members when they became in arrears in union dues.

There is nothing in the legislative history of Taft-Hartley to indicate that Congress intended to interfere with or instruct unions in their bargaining for or actions under seniority systems.

In conjunction with the issue of "superseniority" there arose a question as to whether or not Union officials such as shop stewards who by union contract were given "top-seniority" could retain their jobs if returning veterans were laid off during the first year of their reemployment. The court in passing upon *Gauweiler* v. *Elastic Stop Nut Corp.,* 162 F. 2d 448, 20 LRRM 2140, said:

> "Let us consider briefly what our employee's seniority rights would have been, had he remained con-

tinuously employed in the plant, without having been called away to war service. He would, of course, have his rights fixed as to seniority, working conditions, pay, and all the rest, by terms of the contract entered into between the recognized bargaining agent and the employer. Furthermore, the terms of such contract would have been the measure of his rights whether he was, himself, a member of the bargaining union or not. That is one of the incidents which results from the collective bargaining practice carried on by the bargaining agent designated by the majority and is indeed no more than the application in the industrial world of what we all experience in the world of public affairs.

"In entering into labor contracts, the bargainers must make their agreements with a view to the rights of the entire group bound by them, and not enter into agreements which discriminate against one part for the benefit of another. The provision for top or preferred seniority for union officers and other officials is neither uncommon nor arbitrary. It may add a pleasant emolument to a particular union office, but it also provides what union members may well consider a highly essential matter: that is, to have their own representatives on the job to look after their interests, so long as work is being done in the plant.

"It is to be emphasized that in our case there is no suggestion of discrimination against veteran-employees. The significance of that point was mentioned by the Supreme Court in the Trailmobile case (7 U. S. S. Ct. Bull. 1547, at 1565 (19 LRRM 2531). Discrimination would, obviously, change the whole picture. If, during the absence of some of the employees at war, those remaining got together and created union offices for themselves so that everyone had an office, and then proceeded to provide top seniority for union officers, a court would have no trouble in seeing that this device was simply an effort

> to discriminate against absent fighting men. No such point is involved in the problem before us. * * *"

See also *Koury* v. *Elastic Stop Nut Corp.*, 162 F. 2d 544, 20 LRRM 2145; *DiMaggio* v. *Elastic Stop Nut Corp.*, 162 F. 2d 546, 20 LRRM 2146. The Court's attention is directed to the fact that here again the lack of discrimination was deemed significant.

The members, or at least a majority of them, of respondent apparently considered the current payment of dues as "a highly essential matter" since they attached the penalty of loss of seniority for failure to pay within the month.

C. The actual question on which certiorari was granted was: Must the record as a whole before the United States Court of Appeals contain substantial evidence to support a conclusion that discrimination in regard to the tenure or condition of employer of an employee did or would encourage or discourage members in a labor organization.

As heretofore pointed out, Section 8 (a) (3) of the National Labor Relations Act is violated only if there is a discrimination from which an encouragement of Union membership naturally and proximately follows. The petitioner has broadened the scope of that section so as to make it encompass a far greater meaning than Congress ever intended. The idea that any assistance or cooperation by an employer in the application of a Union's rule to employees who are members of the Union and who do not intend to refrain from such membership and its concommitant benefits and liabilities violates the Act is an enlargement of the plain wording of Section 8 (a) (3).

The court below correctly followed the applicable law and stated: "The rule to be applied by this court in determining the validity of the Board's finding is set out in

Par. 10 (e) of the National Labor Relations Act as amended in 1947 by the Labor Management Relations Act, known as the Taft-Hartley Act (61 Stat. 148, 28 U. S. C., Supp. III, Par. 160 (e). This section reads: 'The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.' See *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474; *Labor Board* v. *Pittsburgh Steamship Co.,* 340 U. S. 498 (R. 94), and that "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 229. Quoted in *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 477. It 'must do more than create a suspicion of the existence of a fact to be established.' *Labor Board* v. *Columbian Enameling & Stamping Co.,* 305 U. S. 292, 300."

After the court below found there was no basis for the petitioner's finding that the employer discriminated against Boston in violation of Section 8 (a) (3) of the National Labor Relations Act, it further found that the record in this case is absolutely barren of any evidence at all that the employer's actions encouraged or discouraged membership in a labor organization within the meaning of Section 8 (a) (3). The court then cited the respondent's contention with respect to *N. L. R. B.* v. *Reliable Newspaper Delivery, Inc.,* 187 F. 2d 547 (C. A. 3), in which that court said:

> "Even if we should assume that the disparity brought about by the retroactive payments amounted to discrimination, then, under the statutory language, *we must go further and ascertain* whether that discrimination encouraged membership * * * in the Newspaper and Mail Deliverers' Union of New York and

vicinity. And we do not find substantial evidence of that encouragement. * * *."

"* * * While our decision in *Quaker State Oil Refining Corp.* v. *National Labor Relations Board,* 119 F. 2d 631 (4 Labor Cases, para. 60, 435), had to do with alleged 8(3) violations which arose out of the actions of employees, the underlying thought of that case is quite material here. We there said at page 633: 'It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the Union.' See also *National Labor Relations Board* v. *Public Service Co-Ordinated Transport,* 3 Cir., 177 F. 2d 119 (17 Labor Cases, para. 65,322).

"Generally speaking, the proposition that in order to establish an 8 (a) (3) violation there must be evidence that the employer's act encouraged or discouraged union membership has widespread support. In *National Labor Relations Board* v. *Air Associates, Inc.,* 2 Cir., 121 F. 2d 586 (4 Labor Cases, para. 60,587, 60,716), the court held at page 592: 'Section 8(3) requires that the discrimination in regard to tenure of employment have both the purpose and effect of discouraging union membership.' The later decision in that same circuit, *National Labor Relations Board* v. *Cities Service Oil Co.,* 129 F. 2d 933, 937 (6 Labor Cases, para. 61,147), in no way restricted that language. In *Stonewall Cotton Mills, Inc.,* v. *National Labor Relations Board,* 5 Cir., 129 F. 2d 629 (5 Labor Cases, para. 61,099), the Board had found certain lay-offs and discharges to have been in violation of Section 8(3). The court said at page 632: 'To make out a case under it, it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization.' This conclusion was not disturbed by the motion for rehearing (129 F. 2d 633)

> which was disposed of entirely upon evidential grounds. To the same effect see *Western Cartridge Co.* v. *National Labor Relations Board,* 7 Cir. 139 F. 2d 855, 859 (7 Labor Cases, para. 61,095, 61,967); *National Labor Relations Board* v. *Reynolds International Pen Co.,* 7 Cir., 162 F. 2d 680, 690 (13 Labor Cases, para. 63,872); *Wells, Inc.,* v. *National Labor Relations Board,* 9 Cir., 162 F. 2d 457, 459, 460 (12 Labor Cases, para. 63,848); *National Labor Relations Board* v. *Robbins Tire and Rubber Co., Inc.,* 5 Cir., 161 F. 2d 198, 801 (12 Labor Cases, para. 633,776).
>
> "As above indicated, we find no substantial evidence in the record to justify the Board's holding that respondent had violated Section 8(a) (3) of the Act. * * *"

Citing this Court's decision in *NLRB* v. *Fansteel M. Corp., supra,* the Court of Appeals, 9th Circuit, in *NLRB* v. *Potlatch Forests,* 189 F. 2d 82, 85, said:

> "Failure of an employer to maintain previous seniority rights for returning strikers may be said to discourage union membership, but many acts of an employer which seem to come within the language of Section 8(a)(3) are nevertheless permissible if they are done for a legitimate business purpose."

and found that:

> "Potlatch has exhibited no anti-union prejudice and in making the selection has provided that all of the individuals in the returning group retain full seniority rights as between themselves.
>
> "There has been no discrimination between union and non-union employees on the basis of union membership."

The indentical situation is present here in that Byers Transportation Company, as between the union members

group of employees, has allowed them to make their own determinations of seniority and did not discriminate between its union and nonunion members.

Again in *Western Cartridge Co.* v. *NLRB,* 139 F. 2d 855, the Seventh Circuit Court of Appeals said:

> "Without violating Section 8(3) of the Act, the company had a right to discharge these (striking) employees or to refuse to take them back into its employ as long as it did not discriminate against them in such a manner as *to encourage or discourage membership in any labor organization.* (Court emphasis.) * * *Under Section 8(3) of the Act to constitute the unfair labor practice of discrimination, the discrimination with regard to hire and tenure must have the purpose 'to encourage or discourage membership in any labor organization.'
>
> "The Board has found discrimination because of concerted activities. We think there is evidence to support such findings. We must go one step further. Was that discrimination to encourage or discourage membership in any labor organization? * * * Without bothering to point out any evidence to support a finding that such discrimination was *for the purpose of encouraging or discouraging membership in any labor organization* (court emphasis), the Board finds such discrimination 'thereby discouraged membership in the Union, etc.'
>
> "We are unable to find in the record any substantial evidence to support a finding that the Company's acts toward its striking employees in the matter of their hire and tenure were taken to discourage membership in a labor organization. * * *
>
> "We recognize the exclusive right of the Board to draw inferences but there must be some evidence from which the inference can be drawn."

Disposing of an additional, separate, individual finding of Section 8(3) violation, the court also said:

> "This finding shows only that the Company discharged Groessman for a reason that did not exist in fact. Does it therefore follow as a reasonable inference that Goessman was discharged in order to discourage his membership in a labor organization? * * * We think there is not substantial evidence to support the Board's finding as to Groessman."

To the same effect see also the decisions of the Eighth Circuit in the case of *N. L. R. B.* v. *Webb Construction Company,* 196 F. 2d 702, 30 L. R. R. M. 2125, in which the court said:

> "There can be no violation of this statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization. * * * Nothing in the National Labor Relations Act prevented a Union from adopting rules of its own as to distribution of work among its members. No one is required to join the Union and subject himself to such rules and regulations; neither is there any inhibition against *his withdrawing from the Union* if such rules and regulations are not satisfactory to him[8]. We conclude that the termination of Pickard's employment did not reasonably tend to encourage membership in respondent Union or to discourage membership in Local 101-B within the purview of the National Labor Relations Act." (Citing the Reliable Newspaper Delivery, Inc. Winona Teytile Mills, Potlatch Forests, and Western Cartridge Company cases, *supra.*)

[8]A situation which is exactly analogous to that of the instant case.

D. A finding of Section 8 (b) (2) violation must be predicated upon a finding of violation of Section 8 (a) (3).

The court below found that "the evidence here abundantly supports the finding of the Board that the respondent caused or attempted to cause the employer to discriminate against Boston in regard to 'tenure * * * or condition of employment'," and that "this was a violation of Section 8 (b) (2) of the Act." *Respondent cannot agree with this latter statement.* There is nothing in this record that would tend to establish that the application of Section 45 to Boston's seniority standing was motivated by his support of any other Union or his efforts to undermine respondent or that such by-law was of the "indefensible" variety. Cf. *N. L. R. B.* v. *Elk Lumber Company.* 91 N. L. R. B. 333.

On the contrary, had the respondent treated Boston in any manner other than it did it would have been guilty of discriminatory treatment of its other members employed by Byers Transportation Company who had, as did Boston, agreed to be bound by Section 45 and many of whom had in the past been adversely affected by the application of that section to their seniority standing. The respondent, therefore, was, if the Board's theory is correct, in a dilemma from which it could not extricate itself. Only Boston had the means of extricating respondent from the situation, and that by simply withdrawing from membership.

The Board's theory appears to be that membership in a labor organization, at least within the purview of Section 8 (a) (3), includes the benefits and liabilities incidental to that membership, and also includes good standing based on the faithful performance of membership obligations. Further, the Board says that the respondent's action, having been in conformance with one of its by-laws, en-

couraged membership in respondent inasmuch as it encouraged compliance with its by-law. This theory is extremely untenable since there is nothing in the legislative history of the Act which even tends to show that Congress had any such thing in mind in phrasing Section 8 (a) (3). Nowhere does it appear that Congress intended that after a member of a labor organization had voluntarily accepted the obligations of membership the Union could be prosecuted under Section 8 (b) (2) for nondiscriminatory, as between members, application of its membership rules. In fact, by the proviso to Section 8 (b) (1) a contrary intention is indicated.

Conclusion.

For the reasons stated, it is respectfully submitted that the decision below should be affirmed.

CLIF. LANGSDALE
JOHN J. MANNING,
928 Scarritt Building,
Kansas City, Missouri,
Attorneys for Respondent.